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IN THE

Supreme Court of the United States

October Term, 1973

No. 72–1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, AND SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The order of the district court is unreported (SA 19). The opinion of the Court of Appeals (SA 20-54), appears at 475 F.2d 325.

JURISDICTION

The judgment of the Court of Appeals (SA 55-56) was entered on January 5, 1973, as amended January 10, 1973. The mandate has been stayed by the Court of Appeals (SA 57) pending disposition of proceedings in this Court. F.R. App. P. 41(b).

Certiorari was granted on May 14, 1973. 411 U.S. 981. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether injured and aggrieved parties may maintain actions to enjoin violations of the Amtrak Act, or whether Section 307 of the Act, 45 U.S.C. 547, bars suits by all parties other than the Attorney General of the United States, railroad employees and railroad employee representatives.

STATUTE INVOLVED

The statute involved is Section 307 of Rail Passenger Service Act of 1970, 84 Stat. 1333. The section is set forth below. The title, as enacted, is at a variance with that shown in the United States Code, and in petitioners' brief.[1]

SEC. 307. SANCTIONS.

(a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or interferes with any activities authorized by this Act, refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which

[1] Pet. Br., pp. 2-3. Cf. 1970 U.S. Code Cong. & Adm. News 1552; 45 U.S.C. 547 (1970 ed.); [redacted] 1 U.S.C. 204(a); *United States v. Welden*, 377 U.S. 95, 98-99, fn. 4 (1964); *Stephan v. United States*, 319 U.S. 423, 426 (1943).

the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

(b) Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act.

STATEMENT

This is the first railroad passenger train discontinuance to be accorded plenary consideration since the October 30, 1970 enactment of Rail Passenger Service Act of 1970 ("Act"),[2] and the massive train discontinuances which followed on May 1, 1971.[3]

The action was brought by National Association of

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[2]P. L. 91-518, 84 Stat. 1327, 45 U.S.C. 501.

[3]The constitutionality of the Act in certain respects was sustained in *Quincy College & Sem. Corp. v. Burlington Northern, Inc.*, 328 F.Supp. 808 (N.D. Ill. 1971), aff'd per curiam 405 U.S. 906 (1972). Certain transitional matters were dealt with in *Illinois Commerce Commission v. Chicago & E.I.R. Co.*, 400 U.S. 987 (1971); *Baker v. Pennsylvania*, 400 U.S. 875 and 401 U.S. 902 (1971); *Pennsylvania v. Baker*, 405 U.S. 918 (1972). The matter of liquor sales aboard Amtrak trains is before this Court in No. 73-128, *National Railroad Passenger Corp. v. Miller*, reported below at 358 F.Supp. 1321 (D. Kans. 1973). Cf. *National Railroad Passenger Corporation v. Harris*, 354 F.Supp. 887 (W.D. Okla. 1972).

Railroad Passengers,[4] respondent herein, to enjoin the discontinuance by Central of Georgia Railway Company of its "Nancy Hanks" passenger train which operated between Savannah and Atlanta, Ga., and two other trains which operated between Albany, Ga. and Birmingham, Ala., on the ground that the proposed discontinuances on May 1, 1971 would violate sections 404(a) and 802 of the Act.[5]

While the action was pending in the district court, another judge of the same court on April 30, 1971, ruled that only the Attorney General and railroad labor have standing to sue over violations of the Act. *Congress of Railway Unions v. Hodgson,*

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[4]National Association of Railroad Passengers is a national organization of railroad patrons. No question of its standing to bring the action from the standpoint of its members being sufficiently adversely affected or aggrieved was made at any point below. The organization is the principal spokesman for railroad passengers throughout the nation.

[5]45 U.S.C. 564(a) and 642. The Court of Appeals characterized the action as follows (SA23): Section 802 provides that "no railroad may discontinue any intercity rail passenger service whatsoever other than in accordance with the provisions of this chapter* * *." Section 404(a) bars a railroad from discontinuing any of its intercity passenger trains prior to January 1, 1975, unless that railroad has entered into a contract with Amtrak pursuant to Section 401(a)(1) of the Act, 45 U.S.C. 561(a)(1). The latter provision authorizes Amtrak to contract with a railroad "to relieve the railroad * * * of its entire responsibility for the provision of intercity rail passenger service". Although Central has entered into a contract with appellee Amtrak to relieve Central of its entire responsibility for intercity rail passenger service, appellant contends that Central and Amtrak have not complied with Section 401(a)(1) because Central is but a subsidiary of appellee Southern Railway Company (Southern), which has not entered into a contract with Amtrak. In appellant's view, then, the Act requires that Amtrak either enter into a contract to relieve Southern of its entire responsibility for intercity rail passenger service or enter into no contract at all. After oral argument on appellant's motion for a temporary restraining order, the District Court dismissed the action on the ground that appellant did not have standing to maintain this action under Section 307 of the Act.

326 F.Supp. 68 (D.C. 1971). Five days later the district court in the instant proceeding issued a brief order dismissing the complaint on the ground "that the plaintiff does not (have) standing to maintain this action under section 307 of the Rail Passenger (Service) Act of 1970." (SA 19).

The Court of Appeals consolidated the instant appeal with that taken by one of the parties in *Congress of Railway Unions, supra.* The Court of Appeals on January 5, 1973 reversed the district courts in both instances.[6] In a comprehensive 34-page opinion, the Court of Appeals unanimously ruled that the fine distinctions among the doctrines of standing, jurisdiction, reviewability, and causes of action often pose thorny problems for the law, but that analysis of all these doctrines lead to the same conclusion–adjudication of the merits. (SA 24).

The decision of the Court of Appeals is consistent with that of the U.S. District Court for the District of Connecticut. *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908 (D. Conn. 1972)

Petitioners, Central of Georgia Railway Company, Southern Railway Company, and Amtrak, applied for a writ of certiorari from this Court. The United States of America filed an Amicus Curiae brief in support of granting the writ, stating that the decision of the Court of Appeals is likely to lead to a

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[6] A petition for writ of certiorari was not sought in the companion case. *Potomac Passengers Association v. Chesapeake & Ohio Ry. Co.* The question there involved whether certain train service constituted "commuter or other short- haul" rather than "intercity rail passenger service". A similar question is pending in other courts. In one of these, *People of the State of Illinois v. Chicago & North Western Tr. Co.* (N.D. Ill.-E.D. No. 71 C 1009), the court has ruled that the resolution of the "intercity" versus "commuter" question may depend upon standing of the parties: ". . . the I.C.C.'s holding regarding this case should be forthcoming at about the same time that the U.S. Supreme Court will rule in the *Central of Georgia* case, *supra,* whether someone other than the U.S. Attorney General can bring a suit pursuant to Section 307 of the Amtrak Act, 45 U.S.C. 547, an issue also in our case. If indeed the Supreme Court rules that private parties are barred by Section 307 from bringing suit then this entire proceeding will be rendered moot." (Marovitz, J., Memorandum Opinion, dated July 13, 1973.)

large number of lawsuits designed to delay or defeat Amtrak's curtailment or elimination of service, particularly "in view of the approaching substantial train discontinuances expected after July 1, 1973". (U.S.A. Memo, p. 6).

This Court granted a writ of certiorari on May 14, 1973. 411 U.S. 981.

Rail Passenger Service Act of 1970

Various committees of the U.S. Congress held extensive hearings during the 1959-70 period concerning railroad passenger train service. Transportation Act of 1958,[7] which enacted section 13a of the Interstate Commerce Act, 49 U.S.C. 13a, greatly liberalized train discontinuance procedures by which railroads could terminate passenger service. One result was considerable dissatisfaction with the rulings of the I.C.C. on the part of members of the Congress, and a move toward new legislation.[8]

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[7] 72 Stat. 571.

[8] For example, see: Hearings on S. 1331, *Amendments to the Transportation Act of 1958 (Train Discontinuance)*, before the U.S. Senate Surface Transportation Subcommittee (1959); Hearing on S. 1161, *Train Discontinuances*, before the U.S. Senate Committee on Commerce, Ser. 63 (1963); Hearings on S. 325, *The Crisis in Passenger Train Service*, before the U.S. Senate Committee on Commerce, Ser. 89-11 (1965); Hearing on S. Res. 284, *Passenger Train Discontinuances*, before the U.S. Senate Surface Transportation Subcommittee, Ser. 89-76 (1966); Hearings on H.R. 7004, *Passenger Train Abandonment*, before the U.S. House Subcommittee on Transportation and Aeronautics, Ser. 90-4 (1967); Hearings on S. 1175, *Passenger Train Service*, before the U.S. Senate Subcommittee on Surface Transportation, Ser. 90-17 (1967); Hearings on H.R. 18212, *Railroad Passenger Train Service*, before the U.S. Senate Subcommittee on Transportation and Aeronautics, Ser. 90-46 (1968); Hearing on S. 2711, *Passenger Train Discontinuance–30-Day Notice*, before the U.S. House Committee on Interstate and Foreign Commerce, Ser. 90-23 (1968); Hearings on S. 3861, *Study of Essential Railroad Passenger Service*, before the U.S. Senate Subcommittee on Surface Transportation, Ser. 90-81 (1968); Hearings on S. 674, *Passenger Train Service Legislation*, before the U.S. Senate Subcommittee on Surface Transportation, Ser. 91-37 (1969); Hearings on H.R. 12084, *Passenger Train Service*, before the U.S. House Subcommittee on Transportation and Aeronautics, Ser. 91-31 (1969).

The legislation ultimately adopted originated in 1970 as the individual views of Senator Prouty, appended to a committee report of the U.S. Senate Committee on Commerce, which report had recommended a different bill.[9] The only hearings on the specific bill that became law were held briefly by the U.S. House Subcommittee on Transportation & Aeronautics of the Committee on Interstate & Foreign Commerce, on June 2, 3, and 4, 1970.[10]

The impetus for legislation quickened from a rapidly deteriorating situation, whereby the I.C.C. was approving numerous train discontinuances. Pending during the summer of 1970 was Penn Central's proposal to terminate virtually all of its long-distance east-west passenger train service, extending from St. Louis, Mo. and Chicago, Ill. on the west, to Boston, Mass., New York, N.Y. and Washington, D.C. on the east, embracing such intermediate points as Indianapolis, Ind., Cincinnati and Cleveland, Ohio, Detroit, Mich., Pittsburgh, Pa., and Buffalo, N.Y. The I.C.C. conducted hearings at 35 points along Penn Central's lines. In a lengthy report served September 30, 1970, the agency approved a substantial cut-back in Penn Central's service, and indicated that further reductions might be forthcoming. *Penn Central Transportation Co. Discontinuance*, 338 I.C.C. 380.

The U.S. House Committee on Interstate & Foreign Commerce reported H.R. 17849 on October 7, 1970.[11] The bill was rushed through and passed by both the House and Senate

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[9]Rept. No. 91-765, 91st Cong., 2d Sess. (1970).

[10]Supplemental Hearings on H.R. 17849, Ser. No. 91-62 (1970).

[11]H. Rept. No. 91-1580, 91st Cong., 2d Sess. (1970).

on October 14, 1970, the final day before adjournment, and was approved October 30, 1970 by the President.[12]

The purpose of H.R. 17849 was stated in the committee report:

> PURPOSE
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> The basic purpose of this bill is to prevent the complete abandonment of intercity rail passenger service and to preserve a minimum of such service along specific corridors. This is to be accomplished by creating a National Railroad Passenger Corporation which would be responsible for providing all intercity rail passenger service. All railroads would be eligible to join the corporation, and those which join would be relieved of further responsibility to provide passenger service. The corporation would be expected to revitalize rail passenger service in the expectation that the rendering of such service along certain corridors can be made a profitable commercial undertaking, particularly with new equipment or advanced vehicles. The overriding purpose of this legislation is to preserve and promote intercity rail passenger service and it is neither a duplication of, nor a substitute for, any other program (private or Federal) directed toward the urgently needed solutions of surface transportation problems.

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[12]The Penn Central discontinuances were temporarily stayed by a three-judge district court in early October, 1970, and the action thereafter dismissed as moot after the President signed the legislation on October 30, 1970, for the new Act had an effect on pending proceedings in courts. 45 U.S.C. 642. See: *Baker v. Pennsylvania*, 400 U.S. 875 and 401 U.S. 902.

Rail Passenger Service Act of 1970 placed an immediate moratorium on all train discontinuances until May 1, 1971 at the earliest. The Act authorized creation of a National Railroad Passenger Corporation (Amtrak), to provide intercity rail passenger service. On or before May 1, 1971, and between March 1, 1973 and January 1, 1975, Amtrak is authorized to tender a contract to a railroad to relieve the latter of its entire responsibility for the provision of intercity rail passenger service. Railroads contracting with Amtrak were authorized to discontinue all of their intercity rail passenger service on May 1, 1971, subject to giving the public 30 days' notice.[13] Railroads electing not to contract with Amtrak may not discontinue any intercity service until January 1, 1975, and may do so thereafter under the provisions of section 13a of the Interstate Commerce Act.[14]

The Act provides that Amtrak until July 1, 1973 must provide a minimum level of service, prescribed within 90 days of enactment by the U.S. Secretary of Transportation, and known as the "basic system".[15] However, Amtrak is authorized to provide service in excess of that prescribed for the basic system on its own initiative. Any such additional service provided for a continuous period of two years shall be designated part of the basic system.[16]

Discontinuances under the Act

The U.S. Secretary of Transportation on January 28, 1971, issued his final report designating the basic system, which specified those points between which intercity passenger trains shall be operated. 45 U.S.C. 521, 522. The Secretary specified 21 city-pairs. The level of service is to be at least one daily train

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[13] 45 U.S.C. 561.

[14] 45 U.S.C. 564.

[15] 45 U.S.C. 521, 522, 564(b)(1).

[16] 45 U.S.C. 563(a).

in each direction—a total of 42 trains—unless patronage and other factors indicate that daily frequency is not warranted.[17]

Amtrak was incorporated on March 30, 1971.[18] Most railroads opted to contract with Amtrak, and they posted notices proposing to discontinue some 527 intercity trains effective May 1, 1971.[19] This large number of trains came as a surprise to many, as it was generally understood that there were far fewer intercity trains in existence. Amtrak's Chairman, David W. Kendall, testified before the U.S. Senate Subcommittee of the Committee on Appropriations on April 6, 1971, that there were 360 intercity trains operated in 1970.[20] Secretary of Transportation John A. Volpe testified before the U.S. House Committee on Interstate & Foreign Commerce on April 22, 1971, that there were 366 trains in operation in 1970.[21]

Various actions were instituted, predicated upon allegations that the railroads had included numerous "commuter" trains in their "intercity" discontinuance notices to become effective May 1, 1971.[22]

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[17]The full text of the report is reproduced in Hearings on H.R. 709, *Review and Refunding of Rail Passenger Service Act*, before U.S. House Subcommittee on Transportation & Aeronautics, Ser. No. 92-53, at pp. 149-244 (1971).

[18]The articles of incorporation and by-laws as of May 4, 1971, are reproduced in Hearings on *Administration's Request for Additional Funding for Amtrak*, U.S. Senate Subcommittee on Surface Transportation, Ser. No. 92-29, at pp. 377-423 (1971). Penn Central owns approximately 55 percent of Amtrak's common stock. Id. at pp. 588-90.

[19]Ibid. at p. 549.

[20]Hearings on *Second Supplemental Appropriations for Fiscal Year 1971*, U.S. Senate Subcommittee of the Committee on Appropriations, 203 (1971).

[21]Footnote 17, *supra*, at p. 145.

[22]Some of these are set forth in the opinion below. (SA 54, fn. 27). Upon reference from a district court, the I.C.C. found that 44 passenger trains and 7 buses, contained in Penn Central's May 1, 1971 notice, did not constitute "intercity rail passenger service". *Penn Central Transp. Co.-Status of Passenger Serv.*, 338 I.C.C. 621 and 338 I.C.C. 690 (1971). The U.S. Attorney General is resisting the implementation of this decision on

Amtrak commenced operations on May 1, 1971 with 184 trains, considerably in excess of the 42 trains prescribed for the basic system.[23] These additional trains could be discontinued at any time by Amtrak, and some, in fact, were discontinued.[24] 45 U.S.C. 564(b)(2). However, those additional trains which have been continuously operated for a two year period become part of the basic system pursuant to the Act, 45 U.S.C. 563(a), and a basic system train cannot be discontinued by Amtrak prior to July 1, 1973. Any discontinuance by Amtrak of basic system service must be according to the procedures of section 13a of the Interstate Commerce Act. 45 U.S.C. 564(b).

Amtrak on July 2, 1973 filed section 13a(1) notices with the Interstate Commerce Commission, proposing to discontinue its important Chicago-Florida, New York-Kansas City, and Richmond-Newport News trains. The I.C.C. instituted an investigation into the proposed train discontinuances, and has ordered continued operation pending hearing and decision in its investigations.[25] Amtrak, on August 31, 1973, withdrew the notices for its New York-Kansas City and Chicago- Florida trains.

The initial three years since enactment of Rail Passenger Service Act of 1970 thus far have witnessed an overall decline in

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the ground of standing. No. 71-2301 (E.D. Pa.), *Commonwealth of Pennsylvania, et al. v. Baker, et al.*.

[23]Hearings on *Second Supplemental Appropriations for Fiscal Year 1971*, U.S. Senate Subcommittee of the Committee on Appropriations, 168-69 (1971).

[24]The situation in *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908 (D. Conn. 1972), is one such example.

[25]Finance Docket No. 27436, *National Railroad Passenger Corporation (Amtrak)–Discontinuance of Trains Nos. 30 & 31, 530 & 531–Between New York, New York/Washington, D.C., and Kansas City, Missouri (National Limited)*; Finance Docket No. 27437, *National Railroad Passenger Corporation (Amtrak)–Discontinuance of Trains Nos. 52 & 53 Between Chicago and St. Petersburg/Miami, Florida (The Floridian)*; and Finance Docket No. 27438, *National Railroad Passenger Corporation (Amtrak)–Discontinuance of Train Nos. 98 and 99 Between Newport News and Richmond, Virginia, (The George Washington/ James Whitcomb Riley)*. The first two orders were entered July 20, 1973, and the third order was entered August 9, 1973.

the amount of train service available to the public.

SUMMARY OF ARGUMENT

The Court of Appeals sustained the right of respondent passenger association to sue to prevent the discontinuance of particular train service alleged to be in violation of Rail Passenger Service Act of 1970. We rely upon the exhaustive opinion of the Court of Appeals, without again tracking all of the reasons set forth in its brilliant 34-page opinion as to why standing to sue should be accorded. This answering brief is primarily devoted to new contentions advanced by Amtrak and the railroads in this Court.

Rail Passenger Service Act of 1970 was rushed through the U.S. Congress in the final days before adjournment—passing both chambers on the final day—in the face of threatened massive passenger train discontinuances by the nation's largest railroad which had been approved by the I.C.C. and which were likely to be implemented immediately.

Section 307 of the Act says that the Attorney General, employees and labor representatives, may sue Amtrak or any railroad to enjoin actual or threatened violation of the "policies and purposes" of the Act, but section 307 does not say that *only* these parties may bring suit to enjoin a violation of the specific provisions of the statute.

1. The statutory language was not an attempt to *bar* other parties from access to the courts, but merely to *authorize* the Attorney General to enforce certain rights which otherwise might be private rights. With respect to railway labor, Congress may have intended special standing since railway labor was not in the primary class to be protected by the Act.

2. The legislative history sustains the right of review. Contrary to the constrained interpretation of the role and function of the U.S. Secretary of Transportation in drafting the legislation, advanced by petitioners, the House subcommittee did not pattern section 307 upon the exact recommendations of that official. When Congress wished to bar access to the courts, as in section 202 of the Act, it did so explicitly.

3. Allowing aggrieved persons access to the courts would assist in carrying out the will of Congress. Congress has specifically legislated that train discontinuances are to be subject to customary discontinuance procedures, which procedures include access to the courts, so that standing to sue for unlawful discontinuances would effectuate the legislative design. The Attorney General has not instigated or participated in any actions other than in defense of Amtrak and the railroads. Standing for passenger associations is necessary if the purposes of Congress are to be achieved.

4. Contentions that the federal judiciary lacks jurisdiction are without merit. This case is clearly distinguishable from *Switchmen's Union v. Board*, 320 U.S. 297. A cause of action arises from a violation of the provisions of the Act which may be instituted by the persons intended to be protected by the Act.

ARGUMENT

I. THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 307 SUPPORT ACTIONS AGAINST AMTRAK OR A RAILROAD.

Rail Passenger Service Act of 1970 was rushed through the Congress to meet an emergency situation. There is a presumption that Congress did not desire to extinguish conventional judicial review in such circumstances. (SA 28).

A. *Statutory Language.* The statutory language of section 307 does not mean that persons other than the U.S. Attorney General are precluded from instituting an action for a violation of the Act in non-labor situations, contrary to petitioners' contentions. (Pet. Br., pp. 12-14) The opinion of the Court of Appeals more than adequately deals with this argument, which argument is based upon an erroneous application of the *expressio unius est exclusio alterius* maxim. (SA 28-34).

The provision for standing for the Attorney General does not bar other parties from access to the courts, but merely authorizes the Attorney General to institute suits. This is understandable because Amtrak is a quasi-public corporation heavily funded by the public treasury. The authority of the Attorney General extends to injunctions against actual or threatened violation of the "purposes and policies" of the Act, which is far beyond an ordinary private suit, and far beyond what otherwise might be private rights, thus suggesting that section 307 provides for suits by the Attorney General in addition to the ordinary private action contemplated by aggrieved persons.

The inclusion of employees or labor organizations in section 307 is likewise understandable, since the Congressional findings and declaration of purpose relate to the "traveler in America" without mention of labor or labor-management relations, 45 U.S.C. 501, so that Congress could have intended that labor might need special protection. Clearly, it cannot be inferred from the statutory language that Congress intended to bar other persons from instituting suit.

B. *Legislative History*. The legislative history of the Act does not support petitioners' argument that the House committee's unexplained refusal to adopt an amendment proposed in Subcommittee by railway labor—while at the same time making full provision for railway labor[26]—means that Congress intended to exclude other parties from the courts. As noted by the Court of Appeals, analysis of the matter does not begin from a neutral posture, but from a presumption in favor of access to the courts. (SA 28). Section 307 does not say that *only* the Attorney General may institute an action in a

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[26] Railway labor offered an amendment to section 307 in the House subcommittee so as to include sanctions against "any railroad" as well as against Amtrak, and to allow suits "by any person adversely affected or aggrieved thereby, including the representatives of the employees or any railroad or of the corporation." As reported from the House committee, and enacted, section 307 mentions suits against "any railroad" and suits by "any employee affected thereby, including duly authorized employee representatives." See: Supp. Hearings on H.R. 17849, at pp. 122, 141-42.

non-labor situation, a point of importance in the two reported district court opinions on the issue. Cf. *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908, 911 (D. Conn. 1972); *Congress of Railway Unions v. Hodgson*, 326 F.Supp. 68, 78 (D.C. 1971).

As with its treatment of the statutory language, we believe the opinion of the Court of Appeals is quite adequate on this score also. (SA 34-39).

Now, for the first time, Amtrak and the railroads advance the contention that an intention by Congress to exclude private parties from the courts may be inferred by "acceptance of an Executive Branch recommendation" made by "the administrative officer charged with administration of the Act", in this case the U.S. Secretary of Transportation, John A. Volpe. (Pet. Br., pp. 16, 18).

1. *Role of Executive Branch in Final Bill.* Amtrak and the railroads assert that the House committee redraft of section 307 and the bill as finally enacted are in "exact conformity" with Secretary Volpe's recommendations; that Congress carefully adopted . . . the suggested amendment which Secretary Volpe "endorsed", rejected the specific portion he "opposed" . . . and instead "adopted" his "alternative formulation" and his "counterproposal". (Pet. Br., pp. 15-19)

Amtrak and the railroads are mistaken regarding Secretary Volpe's role in the legislative drafting. The record does not show that any specific language was forwarded by Secretary Volpe; nor does the record indicate that his supplemental views were requested. Rather, on June 18, 1970, the Secretary sent a letter to the Subcommittee with his comments on various amendments proposed by National Association of Regulatory Utility Commissioners, Association of American Railroads, and railway labor. These comments embraced ten sections of the Act. Amtrak and the railroads reproduce the first paragraph of Secretary Volpe's comments on labor's proposed amendment to

section 307 (Pet. Br., p. 15), but have not reproduced the very next paragraph, which reads:[27]

> With respect to inclusion of all railroads within the reach of the section, it should be noted that existing statutes apply to them. To an extent the Corporation is exempt from such statutes or statutory requirements. Consequently, I am not sure that it would be necessary to make sanctions applicable to any railroad. This is particularly so here where such sanctions expressly reach "any action, practice, or policy". The Corporation has a quasi-public character in many respects and the scope of the sanctions with respect to it is appropriate. There is no comparable situation, however, with respect to railroads generally.

It is abundantly clear from the above that the House committee redraft was nowhere in "exact conformity" with Secretary Volpe's recommendations, as the House committee and Congress included the provision for "all railroads" in section 307.[28] Congress did not adopt the amendment which he "endorsed" and reject the portion he "opposed", or adopt his "alternative formulation", etc. Nowhere are we able to find that Secretary Volpe changed his mind with respect to inclusion of "all railroads" in section 307. Amtrak and the railroads have simply misapprehended the legislative facts as we understand those facts.

2. *Role of Secretary of Transportation in Administration of the Act.* In addition to a misapprehension as to the relationship between Congress and the Secretary of Transportation with regard to legislative drafting, Amtrak and the railroads also err in placing the Secretary of Transportation as "the administrative officer statutorily charged with administration of the act." (Pet. Br., p. 18) The principal

[27] Supp. Hearings on H.R. 17849, at p. 85.

[28] At one point Amtrak and the railroads say that Secretary Volpe "stated that he did not object to that portion of the proposed amendment which would allow suits against railroads as well as Amtrak" (Pet. Br., p. 15), whereas elsewhere it is said that the Secretary "acquiesced" in certain aspects of labor's proposed amendment. (Pet. Br., p. 10) We believe both characterizations miss the mark.

function of the Secretary of Transportation was completed before Amtrak was even incorporated. That function was to prescribe the basic system of minimum intercity rail passenger service which Amtrak must operate for the minimum period of 26 months between May 1, 1971 and July 1, 1973.

The Secretary of Transportation is not in complete charge of administration for the Act, but shares such responsibility with the Interstate Commerce Commission. For example, the I.C.C. decides disputes between Amtrak and railroads regarding the initial payments for the privilege of terminating all passenger service, 45 U.S.C. 561(a)(3);[29] contracts between Amtrak and railroads regarding service for Amtrak, 45 U.S.C. 562;[30] discontinuance notices, 45 U.S.C. 561(a)(1);[31] discontinuance of trains in the basic system by Amtrak or discontinuance of trains by non-contracting railroads, 45 U.S.C. 564;[32] disputes between Amtrak and the railroads concerning reimbursement for employee pass privileges, 45 U.S.C. 565(f);[33] and adequacy of service, 45 U.S.C. 641.[34] In addition, the I.C.C. has primary jurisdiction to determine whether a given train provides "intercity rail passenger service."[35] Of course, certain functions of the Act are entrusted to the Secretary of Labor, 45 U.S.C. 565; the Secretary of the Treasury, 45 U.S.C. 602, 622; and the Comptroller General, 45 U.S.C. 645.

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[29] *Losses Under the Rail Passenger Service Act of 1970*, 343 I.C.C. 379 (1972).

[30] F.D. No. 27353, *Baker, et al.-Compensation for Passenger Service* and F.D. No. 27353 (Sub-No. 1), *Determination of Compensation Under Section 402(a) of the Rail Passenger Service Act of 1970.* (Mimeo, June 22, 1973).

[31] 36 Fed. Reg. 5219, 5220 (March 18, 1971); 49 C.F.R. 1122.9.

[32] Footnote 25, *supra.*

[33] F.D. No. 27194, *Determination of Cost Reimbursement Under Section 405(f) of the Rail Passenger Service Act, as Amended* (Mimeo, Dec. 18, 1972).

[34] Ex Parte No. 277 (Sub-No. 1), *Adequacy of Intercity Rail Passenger Service* (pending).

[35] A number of these cases are set forth in the opinion below. (SA 54, fn. 27).

3. *Reports to Congress.* Amtrak and the railroads attach as Exhibit A to their brief, the March 15, 1973 report by the U.S. Secretary of Transportation to the U.S. Congress.[36] This report was mandated by a 1972 amendment to the Rail Passenger Service Act of 1970, and is a one-time report.[37] In the normal administration of the Act, the Secretary of Transportation and the Interstate Commerce Commission submit simultaneous reports (or, in their discretion, a joint report) on March 15 of each year.[38] The I.C.C. issued a report under the earlier version of section 308(b) of the Act,[39] which was far more comprehensive than the report of the Secretary of Transportation.[40]

4. *Absence of Exclusionary Terms.* Clearly, the unexplained failure of a Congressional committee to adopt a proposed amendment is not dispositive. When Congress wanted to exclude judicial review in Rail Passenger Service Act of 1970, it expressly said so, as in Section 202 of the Act, where it precluded judicial review of the basic system prescribed by the U.S. Secretary of Transportation. 45 U.S.C. 522.[41]

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[36]This report is reproduced in Hearings on H.R. 8351, *Financial Assistance to Amtrak*, before U.S. House Subcommittee on Transportation and Aeronautics, Ser. No. 93-22, at pp. 71-181 (1973).

[37]45 U.S.C. 646. Section 12 of P.L. 92-316. See: H. Rept. No. 92-905 and H. Rept. No. 92-1111 (1972). 86 Stat. 227.

[38]45 U.S.C. 548(c). P.L. 92-316 amended the earlier obligation for the submission of reports biennially on October 30. 86 Stat. 227.

[39]The I.C.C.'s report is reproduced in hearings on *Administration's Request for Additional Funding for Amtrak*, U.S. Senate Subcommittee on Surface Transportation, Ser. No. 92-29, at pp. 533-805.

[40]Id. pp. 806-850.

[41]"The basic system as designated by the Secretary shall become effective for the purposes of this Act upon the date that the final report of the Secretary is submitted to Congress and shall not be reviewable in any court."

Amtrak and the railroads suggest that, Congress having withdrawn the prescription of the basic system from judicial review, it would be anomalous for Congress to provide the public with the "equally effective" method of enjoining train discontinuances by allowing suits to enjoin discontinuances. (Pet. Br., p. 20)

The comparison is invalid. The discontinuance by Amtrak of "basic system" trains after July 1, 1973,[42] is expressly made subject to the procedures of section 13a of the Interstate Commerce Act. 45 U.S.C. 564(b)(3). This court has upheld the right of the public to obtain judicial review of section 13a(1) investigations which permit train discontinuances. *City of Chicago v. United States*, 396 U.S. 162 (1969). Even the U.S. Secretary of Transportation, in his March 15, 1973 report, has recognized that the present law authorizes suits to enjoin the discontinuance of "basic system" trains. See: Exhibit A to Petitioners' Brief, at pp. 104-105 and 107-108.

Thus, great significance should be accorded the express exclusion of judicial review in section 202, in contrast with the absence of exclusionary language in section 307. Cf. *Wood v. National Railroad Passenger Corp., supra*, 341 F.Supp. at 911.

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[42] "Basic system" service presently includes far more than the initial 42 trains prescribed by the Secretary of Transportation on January 28, 1971, because additional intercity rail passenger service, voluntarily operated by Amtrak for a continuous period of two years, becomes part of the basic system by virtue of Section 403(a) of the Act. 45 U.S.C. 563(a).

II. ACCESS TO THE COURTS BY THE PUBLIC WOULD ASSIST IMPLEMENTATION OF THE ACT.

The purposes of the Act would be enhanced if the public is permitted access to the courts to enjoin violations of the Act, as it would make more certain that there will be compliance with the Act. Amtrak and the railroads have nothing to fear if they act lawfully. Yet they urge that the decision of the Court of Appeals would "seriously frustrate" the fundamental purposes of the Amtrak act (Pet. Br., p. 21).

The thrust of the argument made by Amtrak and the railroads primarily concerns the prospective discontinuance by Amtrak, after July 1, 1973, of certain long-distance trains.[43] They argue that injunctive relief—even a single preliminary injunction—could disrupt Amtrak's operations (Pet. Br., pp. 21-29). The short answer is that Congress intended to allow review of train discontinuances, including access to the courts, and this is acknowledged by the U.S. Secretary of Transportation in his March 15, 1973 report, where he proposes certain amendatory legislation.[44] Any question of injunctive relief, *pendente lite*, is a matter for the courts. Amtrak would have every opportunity to present its case in opposition to the issuance of any injunction.

Amtrak recently posted discontinuance notices for three important long-distance trains. These discontinuances were suspended by the Interstate Commerce Commission.[45] Although two of the notices were withdrawn, they can be renewed at a later date. Petitioners appear horrified at the

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[43]The United States, in its Memorandum as Amicus Curiae, supporting the request that certiorari be granted, expressed concern for the same prospective train discontinuances after July 1, 1973. (U.S.A. Memo, p. 6).

[44]Exhibit A to Petitioners' Brief at pp. 104-105 and 107-108. Section 404 of the Act, 45 U.S.C. 564, provides that trains in the basic system may be discontinued after July 1, 1973, under the procedures of section 13a of the Interstate Commerce Act. The "basic system" presently includes most of Amtrak's intercity service.

[45]Footnote 25, *supra*.

possibility the discontinuance of the New York-Kansas City train may encounter stiff opposition from the public.[46] To preclude effective judicial review of the Commission's ultimate decisions in these cases—as petitioners would desire—would run directly counter to *City of Chicago v. United States*, 396 U.S. 162 (1969), and would require additional legislation. There is no showing that Congress intended to take away the right of the public to contest train discontinuances by enactment of Rail Passenger Service Act of 1970.

Amtrak and the railroads also point to three cases involving the discontinuance of trains by Amtrak which were not part of the basic system. (Pet. Br., pp. 25-26). We consider these to be *de minimis* and, in any event, Amtrak has nothing to fear if it acts within the law.

The United States points to a fourth action, where the Commonwealth of Pennsylvania and State of New Jersey seek to enforce the I.C.C.'s determination that some 44 trains and 7 buses do not provide "intercity rail passenger service", as claimed by Penn Central and Amtrak.[47] The Department of Justice opposes these States on the ground that they lack standing under section 307 of the Act.

We note that the Attorney General has never instigated or participated in litigation other than in defense of Amtrak and the railroads. This was observed by the court below (SA 42):

> "Indeed, appellees in this case have been unable to refer us to a single instance in which the Attorney General has either instigated or participated in litigation under the Amtrak Act, except for a few cases brought by other parties in which he intervened solely to support the defense that parties other than labor and the Attorney General did not have standing to sue. *Cf. Allen v. State Board of Elections*, supra, 393 U.S. at 566 n. 22. To rely on the Attorney

[46]The New York-Kansas City train mentioned by petitioners (Pet. Br., pp. 24-26) was before the I.C.C. in F.D. No. 27436. See footnote 25, *supra*. Amtrak withdrew its notice on August 31, 1973.

[47]U.S.A. Memo, p. 6. See: *Penn Central Transp. Co.-Status of Passenger Serv.*, 338 I.C.C. 621 and 338 I.C.C. 690.

> General as the sole source of litigation under the Act, as he would be in cases where labor's interests were not adversely affected, is thus to rest enforcement of the entire regulatory scheme on the Attorney General's virtually unreviewable distinction between a mere 'technical' violation and one that seriously interferes with the legislative purpose." (Footnote omitted)

The U.S. Attorney General cannot be relied upon to be the exclusive person (in non-labor cases) with standing to sue. Respondent, National Association of Railroad Passengers, has been unable to interest the Attorney General to institute suit in the instant or in any other violation of the Act. The court observed in *Wood v. National Railroad Passenger Corp.*, 341 F.Supp. 908, 912 (D. Conn. 1972), that the refusal of the Attorney General to act is reviewable only under a very limited standard:

> "It should also be noted that if the Attorney General refuses to act, his discretion, if reviewable at all, would be reviewable only under a very limited standard. *Cf. Littell v. Morton*, 445 F.2d 1207, 1211 (4th Cir. 1971); *Fook Hong Mak v. Immigration & Naturalization Serv.*, 435 F.2d 728 (2d Cir. 1970). The practical effect of his refusal would be to cloak Amtrak and the railroads with governmental immunity. I am reluctant to think Congress intended such a result. Nor is there any indication that the purpose of Congress was to protect the courts against the possibility that they would become over-burdened with increased litigation."

We are unaware of any "Amtrak Section" within the Department of Justice, as claimed by Amtrak and the railroads, to monitor the Amtrak program. (Pet. Br., pp. 28, 29, fn. 31, 35). We know of only one attorney who handles Amtrak matters, and this appears as part of his larger duties concerning the Penn Central reorganization and other railroad reorganizations in the Northeast.[48]

[48]The Dept. of Justice did not appear below. Rather, it sent a letter to Amtrak's counsel authorizing him to bring the Department's position to the attention of the court. (Pet. for Cert., App. E).

There is serious doubt whether section 307 authorizes the U.S. Attorney General to sue for a technical violation of the Act.[49] The Court of Appeals observed that the Attorney General has advised that he has no power under the Act "to sue for a construction of the Act or to enjoin a purely technical violation." (SA 42).

The Attorney General's letter is an Appendix hereto. Amtrak and the railroads elsewhere point to the similarity between section 307(a) and section 403(a) of the Communications Satellite Act of 1962, 47 U.S.C. 743(a). (Pet. Br., pp. 36-37). But the phrase, "*or if the corporation or any other person shall violate any provision of this Act,*" was deleted when the Amtrak section was enacted.[50]

Amtrak suggests that appeals to Congress can be a substitute for court review of train discontinuances. (Pet. Br., p. 28). If this were true, there would be no need for a judicial system in the United States.[51]

We would be remiss if we did not express strong disagreement with some of the seemingly favorable comments which Amtrak extracts about itself from the March 15, 1973 report by the U.S. Department of Transportation to the Congress, concerning Rail Passenger Service Act of 1970, and which Amtrak attaches as an exhibit to its brief here. (Pet. Br., pp. 21-23, fn. 20-22; p. 24, fn. 24). In actual fact, the Department recommends a 14 percent slash in Amtrak's train miles to be operated during the coming fiscal year, which would result in a projected 3 percent decline in passenger miles. This recommendation for further train discontinuances is made in the face of an 11 percent *increase* in passenger miles experienced in the period May-November 1972, over the

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[49] See Opinion below. (SA 42).

[50] The compiler for the U.S. Code has entitled section 403(a), "Sanctions-Petition of the Attorney General for Equitable Relief; venue."

[51] Amtrak has taken the testimony of respondents' President (now chairman) out of context. (Pet. Br., p. 28, fn. 30). Mr. Haswell's remarks were directed to whether some other federal agency should have control over Amtrak's quality of service, and had no relation whatsoever to Section 307. Supp. Hearings on H.R. 17849, at pp. 177-78 (1970).

comparable period in 1971.[52]

Respondent, National Association of Railroad Passengers, has presented its own detailed statement to the Congress. It does not see enactment of Rail Passenger Service Act of 1970, and the creation of Amtrak, as intended to be a method for the orderly liquidation of all rail passenger service in the Nation outside the Northeast corridor. Respondent will not burden this court by making the text of its 74-page statement as to the status of passenger service, presented June 12, 1973 in hearings before a U.S. House Subcommittee, as an Exhibit to its brief.[53]

The decision below will enhance, rather than frustrate, the Congressional purposes of the Act. Judicial review of action taken by Amtrak or the railroads will act as a check upon the decisions of these corporations.

III. THE DECISION BELOW HAS A PROPER JURISDICTIONAL BASIS.

Amtrak and the railroads assert that the general jurisdictional provisions of Section 1337 of Title 28, U.S. Code, is superseded by the so-called specific provisions of section

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[52]Hearings on H.R. 8351, footnote 36, *supra*, at 86, 169. (Pet. Br., Ex. A, pp. 12, 98)

[53]The text is reproduced in full in Hearings on H.R. 8351, footnote 36, *supra*, at 230-304. Respondent's position is that Amtrak has not come to grips with fundamental problems—most of its services are deficient in quality and excessive in operating costs. Hearings on H.R. 8351, *supra* at 249. Amtrak's routes and services do not serve many large and important communities. Its Chicago-Los Angeles trains bypass the populous cities of southern Arizona, which are also important centers for winter vacationers, and its Chicago-San Francisco trains bypass the spectacularly scenic Colorado Rockies west of Denver. Id. at 249-50. Amtrak's on-time performance is mediocre and is worsening. The Chicago-New Orleans trains have *averaged* between 2 and 4 hours late, and those between Chicago and Carbondale, an hour late. Id. at 252-53. Some of the problem is with Amtrak's top management and directors, id. at 255-66, and a great deal of the difficulty is owing to non-cooperation by the railroads with whom Amtrak must contract for services, Id. at 264-76.

307(a) of Rail Passenger Service Act of 1970. (Pet. Br., pp. 29-30). The case citations are wholly inapplicable. They relate to situations where the specific provision pertained to all potential parties, or where the statutes are part of the same enactment.[54] In any event, the "specific" mention of jurisdiction for certain parties in section 307(a) cannot be meant, ipso facto, to exclude other parties who would qualify to invoke jurisdiction under section 28 U.S.C. 1337. As shown in connection with the language and history surrounding the specific mention of the Attorney General in section 307(a) of the Act,[55] there is no demonstrated intention by Congress to exclude the invocation of federal jurisdiction by other persons. Likewise, section 307(a) does not employ the term "exclusive", *Calhoun v. Harvey*, 379 U.S. 134, 137-41 (1964),[56] nor does the statute specify that the "Secretary of Labor *shall* bring all actions." *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), cert. den. 360 U.S. 930 (1959).[57]

This court made it clear in *Switchmen's Union v. Board*, 320 U.S. 297 (1943), that "special circumstances" must be present to defeat the general grant of jurisdiction. 320 U.S. at 300. Amtrak and the railroads argue that special "machinery" exists to settle disputes between competing interests. (Pet. Br., pp. 31-33). However, there is no such machinery for settling disputes between Amtrak and the public or, for that matter, for determining disputes between Central of Georgia Railway Company and railroad patrons over the discontinuance of the "Nancy Hanks", operating entirely within the State of Georgia. Of course, prior to enactment of Rail Passenger Service Act of 1970, the entire history of railroad discontinuances shows that administrative and judicial remedies were available to railroad

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[54](SA 43-47). Amtrak and the railroads assert that the Court of Appeals has constructed a novel theory which was never briefed below. (Pet. Br., pp. 29-30) In our view the entire section 1337 matter was thoroughly briefed below.

[55]*Supra*, at pp. 13-15.

[56]29 U.S.C. 482, 483.

[57]29 U.S.C. 211(a).

passengers. (SA 45, 48-49).[58] We fail to discern any clear command of the statute that these procedures were to be terminated. Indeed, most train discontinuances today are expressly made subject to the procedures existing under section 13a of the Interstate Commerce Act, 45 U.S.C. 564(b)(3), and this contemplates ultimate judicial review.

Moreover, Amtrak and the railroads are mistaken as to the extent of the "machinery". For example, the Secretary of Transportation is not required to solicit and consider the views of "interested persons" in prescribing the basic system, but only the views of the Interstate Commerce Commission, State commissions, railroads, and railway labor organizations, 45 U.S.C. 522;[59] Amtrak is exempt from all I.C.C. regulations with respect to rates, fares, charges, routes and service, and is not subject to any State or other law pertaining to the transportation of passengers as it relates to rates, routes or service, 45 U.S.C. 546(a)(c); and it is unclear whether the Attorney General is empowered to seek to enjoin a specific violation of the Act, in contrast with a violation of the policies and purposes of the Act, 45 U.S.C. 547.

The "machinery" of Rail Passenger Service Act of 1970 is obviously inadequate to substitute for access to the courts. The court in *Switchmen's Union* stated that if the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the general jurisdiction statutory provisions to be applicable. 320 U.S. at 300. See also: *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). We would add that the machinery is hardly neutral with respect to the Attorney General for, as Amtrak and the railroads recognize (Pet. Br., p. 35), the Attorney General operates in conjunction with the

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[58] Apart from Rail Passenger Service Act of 1970, discontinuance of the "Nancy Hanks" would be barred by section 93-307 of the Georgia Code, and Railroad Passenger Rule No. 18 of the Georgia Public Service Commission, without prior approval by the State agency.

[59] See: Hearing on *Administration's Request for Additional Funding for Amtrak*, before U.S. Senate Subcommittee on Surface Transportation, Committee on Commerce, Ser. No. 92-29, at pp. 255-267 (1971).

Department of Transportation in reviewing complaints about alleged violations of the Act. The Department is not, of course, a regulatory agency, as it functions in a promotional role with regard to Amtrak.

The second part of the jurisdictional argument advanced by Amtrak and the railroads is that the Act does not create a "private cause of action". (Pet. Br., pp. 34-36). The word "private" begs the question because admittedly a cause of action arises with respect to the policies and purposes of the Act on petition of the Attorney General or railway labor.

Rail Passenger Service Act of 1970 confers duties upon railroads and upon Amtrak. In particular, unless a railroad contracts with Amtrak, it may not discontinue its intercity rail passenger service. A legal duty is created and imposed upon non-contracting railroads in favor of passengers utilizing trains. The statute clearly aims to protect the railroad passenger, as indicated in the declaration of purpose, for example. 45 U.S.C. 501. Such a cause of action arises from a breach of the railroad's duty to the traveling public, and may be enforced by the class of the public intended to be protected. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

Petitioners next refer to the legislative history behind the sanctions section of Communications Satellite Act of 1962, which is termed "virtually identical" with section 307(a) of the Amtrak Act. See: 47 U.S.C. 743(a). However, there is no Congressional intent to bar suits against Comsat. The remarks of Senator Humphrey and Deputy Attorney General Katzenbach were directed to those who opposed creating any Communications Satellite Corporation, rather than to the question of standing to sue. See: 108 Cong. Rec. 14902 and 16697. Moreover, section 403(a) of the Comsat Act is not "virtually identical" with section 307(a) of the Amtrak Act, for the phrase, " *or if the corporation or any other person shall violate any provision of this chapter*" was not carried forward into the Amtrak statute. Finally, it is observed that there appears to have been no reported cases under section 403(a) of the Comsat statute.

Respondent must emphatically disagree with the final contention of Amtrak and the railroads that the record provides no basis for asserting that the Attorney General cannot or will not take appropriate action to terminate actual or threatened violations of the Amtrak Act. First, the Attorney General has on occasion asserted an absence of power "to sue for a construction of the Act or to enjoin a purely technical violation". Second, we know of no instance in which the Attorney General has participated in litigation other than to assert that the plaintiffs bringing the action lacked standing. (SA 42).

CONCLUSION

For the foregoing reasons, and those given by the court below, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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